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Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

AZTECA ENTERPRISES, INC.,

Petitioner,

v.

DALLAS AREA RAPID TRANSIT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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49pp

QUESTION PRESENTED

I.

IS A CERTIFIED DBE [DISADVANTAGED BUSINESS ENTERPRISE] MINORITY CONTRACTOR WHO IS THE LOW BIDDER ON A CONTRACT TO BE AWARDED BY A PUBLIC TRANSPORTATION AUTHORITY WHO RECEIVES FEDERAL FUNDS AN "APPLICANT", "PARTICIPANT" OR A "BENEFICIARY" AS DEFINED IN *TITLE VI* OF THE CIVIL RIGHTS ACT OF 1964(42 U.S.C. §2000d)?

LIST OF PARTIES

All parties to the underlying appeal are set forth in the caption of this matter.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

AZTECA ENTERPRISES, INC.,

Petitioner,

Vs.

DALLAS AREA RAPID TRANSIT

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE UNITED STATES SUPREME COURT:

Azteca Enterprises, Inc. petitions for a *writ of certiorari* to review, reverse and vacate the judgment of the United States Court of Appeals for the Fifth Circuit wherein Azteca's claims under Title VI were dismissed by Summary Judgment.

OPINIONS BELOW

The judgment of the Court of Appeals was issued on February 6, 2002, affirming in part and reversing in part the judgment of the District Court. The Court of Appeals AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings not inconsistent with its opinion. See Appendix A. The Order of the District Court was issued on January 12, 2001. See Appendix B. The Judgment of the District Court was issued on January 12, 2001. See Appendix

C. The Report And Recommendation Of United States Magistrate Judge was issued on September 15, 2000. See Appendix D. The Order of the District Court granting in part and denying in part Respondent's Motion To Dismiss was issued on August 4, 1999. See Appendix E. The Memorandum Opinion And Order regarding Petitioner's Motion For A Temporary Restraining Order was issued on February 23, 1999. See Appendix F.

JURISDICTION

The jurisdiction of this Court is invoked under its review authority under 28 U.S.C. § 1254(1) and §2101(c). The date of the judgment sought to be reviewed is February 6, 2002. Jurisdiction in the Northern District Court was based on 42 U.S.C. §1983, 42 U.S.C. §1981 and *Title VI* of the Civil Rights Act of 1964 (42 U.S.C. §2000d). Appellate jurisdiction to the Fifth Circuit Court of Appeals was based on 28 U.S.C. §1291.

APPLICABLE CONSTITUTIONAL, FEDERAL STATUTES, RULES OF THE SUPREME COURT, FEDERAL RULES OF CIVIL PROCEDURE AND LOCAL RULE PROVISIONS

FEDERAL STATUTES

***Title VI*, 42 U.S.C. § 2000(d)**

No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance.

STATEMENT OF THE CASE

This is a discrimination case. This is a case brought under *Title VI*. Although Title VI was passed by Congress in 1964, the determination of who is an applicant, participant, or

beneficiary has not been defined by this Court. This is a case of first impression to the Supreme Court of the United States.

Azteca Enterprises, Inc. ["Petitioner" or "Azteca"] alleged that the Dallas Area Rapid Transit authority ["Respondent" or "DART"] committed acts of discrimination in violation of 42 U.S.C. §1981, and §1983; *Title VI* of the Civil Rights Act of 1964 [42 U.S.C. §2000(d)] and the regulations contained in 49 C.F.R. §21, 49 C.F.R. §23, Pub. L No. 95-907 and Pub. L No. 100-656 that require that any mass transit authority that receives federal funds from the United States of America shall not discriminate against persons or companies on the basis of race or national origin, which DART did when it denied awarding a contract to Petitioner for the production of concrete crossties.

Petitioner is a minority owned corporation that is recognized as a Disadvantaged Business Enterprise ["DBE"] by the United States, the State of Texas and the City of Dallas, Texas. As a DBE Azteca is allowed to have participation in contracts that attempt to comply with set asides. *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L. Ed. 2d 902 (1980); *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 109 S.Ct 706, 102 L.Ed. 2d 854 (1989). Azteca is a concrete and steel contractor who submitted the lowest bid on September 3, 1998 to DART for the construction of crossties that were to be used by DART to complete a twenty-three (23) mile extension of its Light Rail Transit System ["LRT"]. Azteca was the only bidder to bid the two-block ties specified by DART and its bid was $5,098,559.00. Rocla Concrete Tie, Inc., a majority owned Anglo company, was the second lowest bidder with a bid of $5,938,275.00, almost $900,000.00 higher than Azteca's bid. DART awarded the contract to Rocla. Azteca claims that the basis for the award was unlawful discrimination. Azteca sought injunctive relief, but the District Court determined that monetary damages would, if proved, be available and sufficient to compensate Azteca.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Azteca filed its Original Petition and application for a temporary restraining order and permanent injunction on February 9, 1999 in the 44th District Court in Dallas, Texas. On the same day, DART removed the case to the Dallas Division of the Northern District of Texas. On February 16, 1999, DART filed a Motion To Dismiss and a response to Azteca's application for a permanent injunction.

On the same date, Rocla Concrete Tie, Inc. filed a Motion To Intervene. Azteca responded to Rocla's Motion To Intervene and Rocla withdrew its attempt to intervene.

On February 23, 1999, the trial court entered a Memorandum Opinion And Order denying Azteca's request for an injunction. See Appendix F. Azteca replied to DART's motion to dismiss and DART replied to Azteca's reply. The trial court heard oral argument on DART's Motion To Dismiss and entered an Order on August 4, 1999 dismissing with prejudice Azteca's 42 U.S.C. §1981 and §1983 causes of action and Azteca's claims under the Texas Constitution and its action for punitive damages. The trial court denied DART's attack on Azteca's claims under *Title VI*. See Appendix E. After the August 4, 1999 Order, DART filed its Original Answer.

Azteca filed a Motion To Amend The Pleadings And Motion For Leave To Join Additional Parties And Brief on October 25, 1999 and Plaintiff's Amended Original Complaint. DART filed a response in opposition to the motion. No action was taken by the District Court on this Azteca motion.

Discovery was conducted by both parties.

On November 15, 1999, DART filed a Motion For Summary Judgment and it's Brief challenging Azteca's "standing to sue" under *Title VI* and Azteca's failure to

establish a prima facie case of racial or national origin discrimination. DART filed its Appendix Volume I and II to support its motion. On December 15, 1999, Azteca filed its response to DART's Motion For Summary Judgment its Brief and Appendix Volume I and II. On February 24, 2000, the District Court referred DART's Motion For Summary Judgment to Magistrate Judge Sanderson. On September 15, 2000 Magistrate Judge Sanderson filed his Report And Recommendation Of United States Magistrate Judge, recommending "that the District Court find that Azteca Enterprises, Inc. has no standing to bring a claim for damages under *Title VI* (42 U.S.C. §2000d)" and that DART'S summary judgment request be granted. See Appendix D. Azteca filed a timely Specific Written Objection To The Proposed Findings And Recommendations Of The Magistrate Judge. Azteca specifically objected to the findings and recommendations that concluded Azteca had no standing because it is was not a participant or a beneficiary under *Title VI*.

On January 16, 2001, the District Court entered an Order adopting the Findings, Conclusions And Recommendation of the Magistrate Judge. The Order granted DART'S motion for summary judgment "based on Plaintiff's lack of standing to pursue claims under 42 U.S.C. §2000(d)." See Appendix B. Judgment was entered on the same day. See Appendix C. Petitioner appealed to the Fifth Circuit Court of Appeals and on February 6, 2002, the Fifth Circuit issued its Opinion affirming the District Court's holding on the *Title VI* issue and reversing and remanding the 42 U.S.C. §1983 and 42 U.S.C. §1981 claims.

STATEMENT OF THE FACTS

This is a discrimination case.[1] Azteca is a minority Dallas owned corporation that is recognized as a "DBE" ["Disadvantaged Business Enterprise"] and as a "MBE" [Minority Business Entrepreneur"] and as a "HUB"

["Historically Underutilized Business"] by the United States of America, the City of Dallas, and the State of Texas.

On July 30, 1998 DART issued a solicitation for concrete crossties [the "Solicitation"] which was a part of DART'S construction efforts to extend DART'S Light Rail Transit System. ["LRT"] The Solicitation covered approximately 23 miles of rail being added to the LRT. The Solicitation allowed the bidders to offer two types of concrete crossties: Standard ties as Alternative A or "two-block" or "dual-block" ties as Alternative B. Both alternatives included the requirements in paragraph 1.4 of the Specifications:

> **Fabricator of precast reinforced concrete and/or prestressed concrete crossties shall be an active and qualified participant in the PCI Plant Certification Program.**[2]
>
> **Concrete crossties shall be produced by a manufacturer who has been regularly and continuously engaged in the manufacture of precast, prestressed concrete products, including concrete crossties.**

Azteca and DART had prior contacts regarding the manufacture of crossties and DART was aware of Azteca's interest and ability to perform. DART issued the Solicitation to bidders and invited Azteca to participate in the bid process. On July 30, 1998, and on September 3, 1998, bids for the Solicitation were opened. Four bids were received. Azteca was the only company who bid the "two-block" ties and was the low bidder with a bid of $5,098,559.00. Rocla Concrete Tie, Inc., ["Rocla"][3] was the second low bidder with a bid of $5,938,175.00, which was almost $900,000.00 higher than Azteca's bid. After the bid opening, DART procurement personnel began the process of verifying that the low-bidder was responsive and responsible. During this process, DART

claims it learned for the first time that Azteca could not meet the two requirements set forth in the Specifications under paragraph 1.4 regarding PCI certification and experience. DART asked Azteca to provide DART information to address DART'S concerns on these two issues. DART never asked Azteca to provide information to address these DART concerns prior to DART making the decision to declare Azteca a nonresponsible bidder.

On September 11, 1998, DART received a protest letter from Rocla, who had previously verbally informed DART that it intended to file a protest within 10 days of the bid opening as required by DART'S regulations. Rocla filed and then withdrew the protest.

On September 14, 1998, DART informed Azteca by letter that it had found Azteca to be nonresponsible for two reasons: (1) Azteca was not an active and qualified participant in the PCI Plant Certification Program as required by the Solicitation PO2475-9, paragraph 1.4.A.1, and (2) Azteca had not been regularly and continuously engaged in the manufacture of concrete crossties as required by the Solicitation PO2475-9, paragraph 1.4.A.2. On September 21, 1998, Azteca responded by letter to DART, pointing out that the reasons relied on by DART were under the Quality Assurance Section of the Specifications and should be considered part of the performance of the work instead of the bid award requirements. Azteca contended that it should be recognized as the low bidder and awarded the contract in accordance with the Solicitation. In response to DART'S first concern, Azteca pointed out that it was a member of the National Precast Concrete Association [NPCA] which governs precast fabrication, and that NPCA is a legal alternative and equivalent to PCI in the Concrete Precast Industry in the United States and has been approved for other projects in the United States as an alternative for PCI. Regarding DART'S second concern that Azteca had not been regularly and continuously engaged in the manufacture of concrete crossties, Azteca pointed out that ITB-

TRADETECH, S.A. ["TRADETECH"], - Azteca's partner for more than four years, is one of the oldest and largest manufacturer of crossties in the world. Azteca pointed out that DART was aware of the relationship between Azteca and TRADETECH and TRADETECH'S abilities and that the arrangement complied with the one year minimum requirement.[4] On September 23, 1998, Azteca filed an official protest and pointed out to DART that Azteca had done approximately $6,400,000.00 worth of contract work for DART in the past as a subcontractor. On October 1, 1998, representatives of Azteca and DART met and discussed the determination that Azteca was nonresponsible. On October 14, 1998, DART denied Azteca's protest, citing the following reasons:

1. Azteca had never "regularly and continuously engaged in the manufacture of concrete crossties."
2. TRADETECH should not be considered the manufacturer of the crossties.
3. DART could not consider TRADETECH to be Azteca's "partner" because Azteca's bid was submitted in its name alone.
4. Azteca had not produced evidence of TRADETECH'S experience in manufacturing concrete crossties.
5. If TRADETECH was to be considered as the manufacturer of the crossties, the problem with the PCI certification remained, because TRADETECH had not been shown to be PCI certified.

On October 20, 1998, Azteca appealed the denial of the protest and made a presentation to the DART Board of Directors on October 27, 1998. The DART Board of Directors decided to submit the controversy to an Administrative Law Judge. Both parties made presentations to the Judge and on January 21, 1999, the Judge granted DART'S Motion To Dismiss. Azteca then filed this action in the state district

court on February 9, 1999. The case was removed, decided, and appealed to the Fifth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

This is a case of first impression in this Court. Although Title VI was enacted in 1964 and there have been many cases determining the scope of *Title VI*, it has never been decided by this Court who is an applicant, participant or a beneficiary under *Title VI*. The Circuit Courts have decided this issue in different ways, as have the District Courts. This Court should grant this *writ of certiorari* so that who are applicants, participants and beneficiaries is clear to all recipients of federal funds in assisted programs.

SPECIFIC LEGAL REASONS FOR GRANTING THE WRIT

1. The United States Court of Appeals for the Fifth Circuit has entered a decision in this case [See Appendix A] which is in conflict with the decision of a Ninth Circuit case, *Fobbs v. Holy Cross Health System Corporation*, 29 F.3rd 1429 (9th Cir. 1994)(Plaintiff asserts a Title VI claim if the Defendant receives federal funds and impermissibly discriminates). See also *Wrenn v. Kansas*, 561 F.Supp. 1216, 1221 (D.C.Kan. 1983)(Citing *Jackson v. Conway*, 476 F.Supp. 896 (E.D.Mo. 1979). This appellate panel decision is contrary to established law in the Fifth Circuit on this issue. See *United States v. Harris Methodist Forth Worth*, 970 F.2d 92,97 (5th Cir. 1992)(holding that doctors are participants in a federally funded hospital under *Title VI*). Cf. *Flanagan v. President and Directors of Gerogetown College*, 417 F.Supp. 377 (D.D.C. 1976)(permitting private action under §601, the analogous section of *Title VI*). See *B. Doe, M.D., On Behalf Of B. Doe And B. Doe's Patients v. St. Joseph's Hospital Of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986)(the plaintiff must be the intended beneficiary of, an applicant for, or a participant in a federally funded program)(citations omitted).

2. A United States Court of Appeals, the Fifth Circuit, has decided an important question of federal law that has not been, but should be decided by this Court, that is, who are applicants, participants, and beneficiaries under *Title VI*.

STANDING

Azteca has standing to sue under *Title VI* because as a DBE it is part of the protected class to which Title *VI* applies. It was an applicant, participant and a beneficiary under *Title VI* as a bidder on this DART LTR project. Azteca seeks relief in order to protect an interest of its own and the injury Azteca asserts is monetary damages for discriminatory actions under *Title VI* by DART.

STANDARD OF STANDING

Justice Brennen in *Baker v. Carr* defined standing as follows:

> "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues of difficult constitutional questions? This is the gist of the question of standing" [5]

Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right. To have standing in federal court, a plaintiff must show (1) that the challenged conduct has caused the plaintiff actual injury, and (2) that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question. *Black's Law Dictionary*, Seventh Edition.[6] Chief Justice Warren defined standing in terms of "cases" and "controversies" recognizing that those words limit the business of federal courts to

questions presented in an adversary context.[7] The federal courts have jurisdiction over this dispute only if it is a case or controversy. In order to meet the standing element of the case-or-controversy requirement, a party must allege a personal injury that is particularized, concrete, and otherwise judicially cognizable.[8] Perhaps, *Marbury v. Madison* said it best when it held that "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[9]

AZTECA HAS STANDING

Azteca seeks relief in order to protect or vindicate an interest of its own. Azteca sued for damages for the damage done to it by the discriminatory actions of DART. Azteca is asserting a plain, direct and adequate interest in suing to have the profits they lost by not being awarded the contract, even though they were the legal low bidder. The injury that Azteca asserts is that they have been damaged by the discriminatory actions of DART.

AZTECA CAN SUE UNDER *TITLE VI*

It is clear that Azteca can sue under ***Title VI*** in a private action for having been the victim of intentional discrimination. *Cannon v. University Of Chicago, Et. Al.*, 441 U.S. 677, 99 S.CT. 1946, 60 L.Ed. 2D 560 (1979); *The Montgomery Improvement Association, Inc. v. The United States Department Of Housing And Urban Development*, 645 F.2d 291 (5th Cir. 1981).

THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS

The Magistrate Judge correctly set forth the relevant portion of ***Title VI*** by recognizing its provisions. ***Title VI*** provides in §601:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance. [10]

It is undisputed that DART has received and continues to receive federal funding to underwrite in part the costs associated with the construction of its light rail transit system and is bound by the provisions of ***Title VI.***

It is clear that Azteca is a "person" under Title VI and is entitled to the protection of Title VI. *North Haven Board of Education v. Bell, Secretary of Education*, 456 U.S. 512, 102 S.Ct. 1912, 72 L.Ed 2d 299 (1982).

On the "participation" aspect of this case, the Magistrate Judge ruled that there was no evidence that Azteca was ever a participant in a federally funded program; that there was no written contract executed by DART with Azteca over the Solicitation and bid; DART made no oral commitment to Azteca; and that Azteca's bid was rejected by DART. See Appendix D.

On the "beneficiary" aspect of this case, the Magistrate Judge ruled that Azteca was not a beneficiary as a matter of law. See Appendix D.

THE DISTRICT COURT'S ORDER AND JUDGMENT

On January 12, 2001, the District Court entered its Order adopting, as supplemented, the Magistrate Judge's Findings, Conclusions And Recommendations. See Appendix B. The District Court held that Azteca had improperly tendered evidence in its objections to the Magistrate Judge's Report And Recommendations, and, after review, concluded that the tendered documents did not establish anything more than Azteca's prior conclusion that it was a "participant" with

no detail other than to identify projects and to provide a number, and that the evidence was "hearsay and conclusory, as well as untimely, and does not cure the standing deficiency." The Fifth Circuit Opinion affirmed the holding of the District Court on the *Title VI* issue. See Appendix A.

ANALYSIS OF *TITLE VI*, THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, THE DISTRICT COURT'S ADOPTING ORDER AND JUDGMENT, AND THE FIFTH CIRCUIT OPINION

TITLE VI

Both trial judges and the appellate panel were wrong in their reading of ***Title VI***. ***Title VI*** provides that "No person...on the ground of ... national origin, **be excluded from participation in, be denied the benefits of**, or be subjected to discrimination under any program or activity receiving federal assistance." [Emphasis Added].

Both trial judges required prior participation by Azteca in order for ***Title VI*** to apply. ***Title VI*** does not require prior participation, as is evident in the statute. It was designed to cover this exact situation, where a company is denied a contract legally won in a bidding contest, but not awarded the contract because of the discriminatory actions of employees of an agency covered by ***Title VI.*** The appellate panel concluded that Petitioners assertion that *Title VI* "was designed to cover this exact situation" was not persuasive. This conclusion is clear error as "[T]he search for Congresse's intent in this case begins and ends with Title VI's text and structure. The rights-creating language so critical to *Cannons* 601 analysis, 441 U.S. at 690,n.13, is completely absent from 602." *Alexander v. Sandoval*, 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), and "We therefore begin (and find that we can end) our search for Congresses intent with the text and structure of *Title VI.*" Id. at ____. *J.I. Case Co. v. Borak*, 377 U.S. 426,433 (1964)(It is the duty of the

courts to be alert to provide such remedies as are necessary to make effective the congressional purpose expressed by a statute). Title VI binds the service provider, or "recipient," thus, it affords a remedy against discrimination by recipients to all participants in a federally funded program, not merely to the individual beneficiaries of the federal aid. Since eligibility for a specific type of aid is determined by criteria unrelated to the discrimination Congress sought to prevent. Cf. *University of California v. Bakke*, 438 U.S. 285, 98 S.Ct. 2733, 2745, 57 L.Ed. 2d 750 (1978)(Powell, J.)("The problem confronting Congress[vis-avis *Title VI*] was discrimination against Negro citizens at the hands of recipients of federal money.").

AZTECA AS AN "APPLICANT" AND "PARTICIPANT"

Both judges at the District Court level and the appellate panel were wrong when they did not recognize that Azteca was an "applicant" and a "participant" in an activity covered by *Title VI*. Azteca was invited to bid on the Solicitation by Dart. At this moment, Azteca became an applicant and a participant under the provisions of *Title VI*. In fact, since DART had been meeting with Azteca prior to the Solicitation, and was counseling Azteca, and used Aztec's crossties as Alternative B in the Solicitation, Azteca was a participant prior to the Solicitation.[11] DART recognized that Azteca was a Disadvantaged Business Enterprise (DBE) and was entitled to "have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under any contract awarded as a result of this solicitation." [12]

The District Court's holding that Exhibit A and B were "hearsay and conclusory, as well as untimely, and does not cure the standing deficiency" was plain error. The Affidavit of Luis Spinola was not conclusory, but was factual. It clearly demonstrated, contrary to the Magistrate Judges' findings, that Azteca had in fact participated in federally

funded contracts with DART as a subcontractor and had a vendor number assigned to it by DART.[13]

AZTECA AS A "BENEFICIARY"

A clear reading of ***Title VI*** leads to the conclusion that Azteca, as well as all DBEs, are meant to be beneficiaries of ***Title VI's*** protection.

Ultimate beneficiaries of a light rail system, such as provided by DART, may be the riders of DART trains, but the beneficiary of a ***Title VI*** action can be a DBE who is to make a profit from the work to be done in building the light rail system. The cases cited by the Magistrate Judge and the appellate panel do not apply to Azteca. The Magistrate Judge was plainly wrong when he concluded that "there is no evidence that Azteca was ever a participant in a federally funded program." The appellate panel's conclusion that "Azteca also fails to demonstrate that it was a participant in a federally-funded program." was clearly wrong. The affidavits of Luis Spinola, and the testimony of witnesses, clearly demonstrate that Azteca did so participate, and the language of ***Title VI*** covers Azteca as a beneficiary of ***Title VI.***

REQUIREMENT OF WRITTEN CONTRACT OR ORAL COMMITMENT BY DART TO AZTECA

Azteca does not deny that no written contract was executed by it and DART. The failure to enter into a written contract is at the core of this case. Azteca alleges that it did not receive the written contract because of discrimination on the part of DART. However, it is clear in this industry that the Solicitation issued by DART is subject to federal law, and is an invitation to participate in a process where federal funds are utilized. Prior to the appellate panel decision, Azteca had not been able to reach that crucial point in this case because of the standing decisions of the District Court.

Azteca has always taken the position that DART, during the many meetings held with DART about this Solicitation, never orally committed anything illegal to Azteca. Azteca, through the oral statements of DART, did rely on those statements in preparing its bid and was participating in a protected activity.

Azteca agrees with the Magistrate Judge that its bid was rejected by DART. That is the essence of this case. DART rejected the bid for discriminatory reasons as set out by Azteca in its Plaintiff's Original Petition in the state court, and the many pleadings filed in the district court.

CONCLUSION

For these reasons, Petitioner would respectfully request this Court to reverse and vacate the Fifth Circuit's decision affirming the District Court's Judgment that Azteca has no right to bring suit under *Title VI*.

Respectfully submitted,

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END NOTES

[1] The trial court made this determination in its Memorandum Opinion And Order of February 23, 1999. [R. Vol. 3, Pg. 457]. Azteca's Plaintiff's Original Petition alleged discrimination under Title VI and the regulations contained in 49 C.F.R. Pt. 21 (1995) and Pub. L. No. 95-507 and Pub. L. No. 100-656 and 49 C.F.R. Pt. 23 (1995) providing for relief against discrimination in the use of federal funds when the contractor is a Minority Business Entrepreneur, and 42 U.S.C. Sec. 1981, providing for the redress of deprivation of the right to make and enforce contracts and to the full and equal benefit of all laws as is enjoyed by White citizens and the 14th Amendment to the Constitution of the United States and 42 U.S.C. Sec. 1983, providing for the redress of deprivation of the equal protection of the laws, and State of Texas due process and discrimination laws provided by the Texas Constitution.

[2] "PCI" is the Precast/Prestressed Concrete Institute. The Specifcations for this Solicitation reference PCI Quality Control Manual MNL-116.

[3] Rocla is a majority Anglo coporation that won the initial DART crossties bid for the first part of DART'S LRT system.

[4] When Rocla was awarded the first DART crosstie bid it was a new company and partnered up with a company and qualified under the one year minimum requirement by doing so. At the time DART awarded the contract to Rocla, Rocla did not have PCI certification for the plant that it intended to use to manufacture the ties. Rocla did not get PCI certification until July, 1999. Rocla did not get approval of its Quality Assurance Program until August 31, 1999. Rocla did not meet the scheduled delivery dates of the contract, which was one of the reasons Azteca was not awarded the contract.

[5] *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703 (1962)(Brennan, J.)

[6] *Black's Law Dictionary*, Seventh Edition, 1999, Pg. 1413.

[7] "The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business

beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine." *Flast Et.Al. v. Cohen, Secretary Of Health, Education, And Welfare, Et. Al.*, 392 U.S. 83, 88 S.Ct 1942, 20 L.Ed. 2D 47 (1968).

[8] *Raines, Director, Office Of Management And Budget, Et. Al.v. Byrd Et. Al.*, 1997 SCT.86(http://www.versuslaw.com).

[9] *Marbury v. Madison*, 1 Cranch 137, 163.

[10] The Magistrate Judge's Report And Recommendation Of United States Magistrate Judge is at R. Vol. 8, Pgs. 1595-1600 and Record Excerpts, Tab 9, Pgs. A595-1600.

[11] Plaintiff's original Petition, [R. Vol. 1, Pgs. 7-37, 40-117], Exhibit 8 [Miguel Coindreau Affidavit], Exhibit 9 [Luis Spinola Affidavit], Exhibit 6 [Interviews/Deposition at Dart, December 2, 1998], Exhibit 11 [Detailed Recollection of Events, Meetings and Discussions held with DART prior and after Bid Opening, DART's Bid # 98034509], Plaintiff's Reply To DART's Response To Plaintiff's Application For Injunction And Brief In Support Thereof [R. Vol. 2, Pgs. 377-450], Plaintiff's Exhibit 1, Affidavit Of Luis Spinola [R. Vol. 2, Pgs. 391-405].

[12] In DART's Response To Plaintiff's Application For Permanent Injunction And Brief In Support,[R. Vol. 2, Pgs. 159-376, Exhibit C, Special Solicitation Instructions & Conditions, [R. Vol. 2, Pgs. 211-247] at page 214 sets forth DART's policy as relates to a Disadvantaged Business Enterprise, at number 9. which provides as follows: 9. **Disadvantaged Business Enterprise (DBE) Participation 91-10017A. Nov 92)**
(a) It is the policy of the Authority and the Department of Transportation (DOT) that Disadvantaged Business Enterprises (DBEs) as defined in Exhibit G of this solicitation and pursuant to 49 Code of Federal Regulations (CFR) Part 23, shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under

23 to ensure that DBEs have the maximum opportunity to compete for and perform contracts. Offerors shall not discriminate on the basis of race, color, national origin or sex in the award and performance of DOT-assisted contracts.

[13] The Affidavit of Luis Spinola is specific and factual. [R. Vol. 8, Pgs. 1605-1606]. The document entitle Exhibit is not hearsay as it was provided to Azteca by DART. [R. Vol. 8, Pgs. 1607]. F.R.Civ. P., Rule 72(b) specifically provides that "The district judge may ... receive further evidence..." Therefore, the Trial Court was in error in not considering the properly offered evidence to demonstrate that Azteca had been a "participant" in a federally funded activity controlled by DART.

(Any footnotes trail end of each document)

SUMMARY CALENDAR
No. 01-10213

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AZTECA ENTERPRISES, INC.,
Plaintiff-Appellant,

v.

DALLAS AREA RAPID TRANSIT,
Defendant-Appellee.

Filed: February 6, 2002

Appeal from the United States District Court
for the Northern District of Texas
(3:99-CV-281)

Before REYNALDO G. GARZA, SMITH, and PARKER, Circuit Judges REYNALDO C. CARZA, Circuit Judge:[1]

I.

Dallas Area Rapid Transit ("DART"), in anticipation of the construction of its light-rail transportation system, solicited bids from contractors for the manufacture of concrete crossties. DART notified 102 contractors, more than forty of which were minority-owned businesses. Seven of the twenty-nine that responded to the notification were minority-owned. Azteca Enterprises, Inc. ("Azteca"), a minority-owned business, submitted the lowest bid of the twenty-nine, and DART's contract officer undertook to determine the responsibility of the contract. This determination required Azteca to submit proof of its Precast/Prestressed Concrete Institute ("PCI") certification and past experience. Azteca failed to submit proof either that it was PCI certified or that it

had maintained continuous and regular production of concrete crossties. As a result, DART determined that Azteca was a non-responsive bidder and thus ineligible to be awarded the contract.

Following DART's responsibility review, the next lowest bidder, Rocla Concrete Tie, Inc. (Rocla), filed a protest contesting Azteca's low bid. After submitting proof of PCI certification and experience manufacturing concrete crossties, Rocla was awarded the contract.

On September 23, 1998, Azteca filed an administrative protest appealing DART's non-responsiveness determination. Following a hearing before Administrative Law Judge Peter Ting, Azteca's protest was denied and the non-responsiveness decision sustained.

In February 1999, Aztecs filed suit in state court alleging (1) racial discrimination under color of law in violation of 42 U.S.C. § 1983; (2) racial discrimination in the formation of a contract in violation of 42 U.S.C. § 1981; (3) racial discrimination in violation of Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d); and (4) violation of due process under the Texas Constitution. Azteca also sought punitive damages.

The case was removed to the United States District Court for the Northern District of Texas, where the court, in response to DART's 12(b)(6) Motion to Dismiss, dismissed Azteca's §§ 1981 and 1983, state constitutional, and punitive damages claims after ruling that DART was entitled to Eleventh Amendment sovereign immunity. DART then filed a Motion for Summary Judgment on the remaining Title VI claim. DART insists that Azteca is neither a beneficiary nor a participant in the federally assisted finding for construction of a light-rail system.

II.

This court reviews a 12(b)(6) dismissals and grants of summary judgment de novo and does not give deference to the trial court. See Green v. State Bar of Texas, 27 F.3d 1083, 1086 (5thr Cir. 1994); McDaniel v, Anheiser-Busch, Inc., 987 F.2d 298, 301 (1993). For dismissals, questions of fact are viewed in the light most favorable to the plaintiff and all well-pleaded facts are accepted as true. See Green, 27 F.3d at 1086. In regard to the summary judgment grant, this court must "review the evidence and inferences to be drawn therefrom in the light most favorable to the nonmoving party." Fed. R. Civ. p. 56(c). A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." McDaniel, 987 F.2d at 301 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)). Summary judgment is appropriate when there is no genuine issue of material fact and only a question of law is presented. See Deas v. River W., L.P., 152 F.3d 471, 475 (5th Cir 1998).

III.

To state a cause of action under Title VI, a plaintiff must allege that he is the "intended beneficiary of, an applicant for, or a participant in a federally funded program." Jackson v. Katy Indep. School Dist., 951 F.Supp. 1293, 1298 (S.D. Tex. 1996)(citing Simpson v. Reynolds Metals, Co., Inc., 629 F.2d 1226, 1235 (7th. Cir. 1980). Azteca asserts that it is both an intended beneficiary and a participant in the DART's federally-funded light-rail construction project. We disagree.

It is difficult to see how a vender of crossties is more than indirectly related to DART's light-rail operations, and Azteca's unsupported claim that Title VI "was designed to cover this exact situation" is not persuasive. The intended beneficiaries of transit system are the commuters, rather than contractors or vendors. See Miller v. Phelan, 845 F.Supp. 1201, 1207 N.D.

III. 1993). Azteca fails to produce any support for its argument that it is an intended beneficiary of DART. Indeed, courts have tended to interpret "intended beneficiary" narrowly, and a consistent approach here precludes us from finding that Azteca qualifies as such. See id.; Jackson, 951 F.Supp. at 1298 (holding that parents of students attending the school system could not sue on their own behalf because it was the students, rather than the parents, who were the intended beneficiaries);United States v. Harris Methodist Fort Worth, 970 F.2d 92, 97 (5th Cir. 1992)(holding that doctors are participants in a federally-funded hospital, but that this is not to say that all vendors of necessary supplies would be considered as such).

Azteca also fails to demonstrate that it was a participant in a federally-funded program. As Azteca admits, no contract was formed. Furthermore, not all vendors qualify as participants. See Harris, 970 F.2d at 97. There "must be some logical nexus between a person's 'participation' and the federally funded program in order for [Title VI] to apply." See id. at 97 n.3 (citing Association Against Discrimination in Employment. Inc. v. City of Bridgeport, 647 F.2d 256, 276 (2d. Cir. 1981)). Thus, even if there had been a contract in place, it would by no means automatically qualify Azteca as a participant under Title VI. Azteca contends that its standing to sue DART under Title VI derives from past dealings with DART. Such dealings by themselves, however, are insufficient to cause us to view Azteca as a participant in a federally funded program. Azteca's relationship in the context of the federally funded program at issue is minimal; it was simply one of twenty-nine bidders for a contract. We find a logical nexus to DART's mission to be lacking. In Harris, we noted that it would be impossible for a hospital to function without doctors, and while the receipt of goods and services from other vendors may ultimately be necessary as well, these vendors are not as central to a hospital's mission as are doctors. See Harris, 970 F.2d at 97-98.

It is likewise difficult to classify Azteca as an applicant to a federally funded program. Azteca was not applying to receive

the benefits of DART; the intended beneficiaries are the commuters that utilize the DART system. Similarly, if Azteca, as a bidding contractor, would not qualify as a participant even if a contract had been in place, Azteca could not be considered an applicant in that sense either.

We affirm the lower court's granting of DART's Motion for Summary Judgment.

IV.

Turning to Azteca's assertion that DART is not entitled to sovereign immunity on its §§1981 and 1983, state constitutional, and punitive damages claims, DART first argues that Azteca failed to properly preserve its argument against sovereign immunity. DART has previously argued this point unsuccessfully before this Court. In addressing DART's previous Motion to Dismiss for Lack of Jurisdiction, we noted that "courts construe a notice of appeal liberally to avoid technical barriers to review." Smith v. Barry, 502 U.S. 244, 248 (1992). Additionally, in the Fifth Circuit, "an appeal from a final judgment sufficiently preserves all prior orders intertwined with the final judgment." Trust Co. of Louisiana v. N.N.P., Inc., 104 F.3d 1478, 1485 (5th Cir. 1997); Cates v. International Tel. & Tel. Corp., 756 F.2d 1161, 1173 n. 18(5th Cir. 1985).

Azteca's Notice of Appeal stated that it was appealing the Court's Order and Judgment filed by the Court on January 12, 2001. DART maintains that this appeal reached only the Title VI claim and not the claims dismissed following DART's 12(b)(6) Motion in August. This January Order was the Court's final judgment, making it clear that Azteca was appealing the final judgment entered by the district court. Furthermore, this final judgment was predicated on having previously dismissed Azteca's §§ 1981 and 1983 claims in the August 4, 1999 Order. Thus, this August Order is sufficiently intertwined with the final judgment. As such, we will not now reconsider our denial of DART's Motion to Dismiss for Lack of Jurisdiction.

Azteca urges us to reverse the district court's ruling dismissing Azteca's claims under 42 U.S.C. 1981 and 1983, the Texas Constitution, and for punitive damages after finding that DART is entitled to sovereign immunity under the Eleventh Amendment. Azteca points us to Williams v. Dallas Area Rapid Transit, 242 F.3d 315 (5th Cir. 2001), a recent age discrimination case in which we held that DART is not an arm of the State of Texas for purposes of the Eleventh Amendment and therefore not entitled to sovereign immunity. See id. at 319. DART, in its brief, argues that the case has been appealed to the U.S. Supreme Court and notes that both the Ninth and District of Columbia Circuits have held similar transit authorities to be arms of the state entitled to sovereign immunity.

Since the briefs in this case have been filed, however, the Supreme Court has denied certiorari, 122 S.Ct. 618 (2001), leaving any circuit split a moot point. Having previously ruled that DART is not entitled to Eleventh Amendment protection, there are no longer grounds left upon which to affirm the district court's dismissal of claims due to sovereign immunity.

Accordingly, the judgment of the lower court is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings not inconsistent with this opinion.

Footnotes

[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5..4.

CIVIL ACTION NO. 3:99-CV-0281-P

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

AZTECA ENTERPRISES, INC,
Plaintiff,

v.

DALLAS AREA RAPID TRANSIT,
Defendant.

January 12, 2001, Filed

January 16, 2001, Entered on Docket

ORDER

After making an independent review of the pleadings, files and records in this case, and the Report and Recommendation of the United States Magistrate Judge, I am of the opinion that except as stated herein, the Findings and Conclusions of the Magistrate Judge contained in the Report are correct and they are adopted as the Findings and Conclusions of the Court.

Although the Plaintiff improperly tendered evidence in its objections to the Report and Recommendations of the Magistrate Judge, the Court reviewed such evidence. It does not establish anything more than Plaintiffs prior conclusion that it was a "participant," with no detail other than to identify projects and to provide a number. That evidence is hearsay and conclusory, as well as untimely, and does not cure the standing deficiency.

The deposition of Luis Spinola referenced in footnote 3 of the Magistrate Judge's Order should be to pp. 50, and 187-89, not 156-59.

IT IS, THEREFORE, ORDERED that the Findings, Conclusions and Recommendation of the United States Magistrate Judge are adopted, as supplemented or amended herein.

IT IS FURTHER ORDERED that Defendant's motion for summary judgment is granted based on Plaintiffs lack of standing to pursue claims under 42 U.S.C. § 2000(d).

SO ORDERED this 12 day of January, 2001.

BARBARA M. G. LYNN
UNITED STATES DISTRICT JUDGE

CIVIL ACTION NO. 3:99-CV-0281-P

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

AZTECA ENTERPRISES, INC,
Plaintiff,

v.

DALLAS AREA RAPID TRANSIT,
Defendant.

January 12, 2001, Filed

January 16, 2001, Entered on Docket

JUDGMENT

The Court has entered its Findings in the case, adopting the Findings and Conclusions of the Magistrate Judge. Therefore,

It is ORDERED, ADJUDGED and DECREED that Defendant's motion for summary judgment is granted.

It is further ORDERED that the Clerk shall transmit a true copy of this Judgment, together with a true copy of the Order Adopting and Supplementing the Findings, Conclusions, and Recommendation of the United States Magistrate Judge, to the parties.

SIGNED AND ENTERED this 12 day of January, 2001.

BARBARA M. G. LYNN
UNITED STATES DISTRICT JUDGE

CIVIL ACTION NO. 3:99-CV-0281-P

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

AZTECA ENTERPRISES, INC,
Plaintiff,

v.

DALLAS AREA RAPID TRANSIT,
Defendant.

September 15, 2000, Filed

September 18, 2000, Entered on Docket

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

Pursuant to the District Court's order of reference directing the magistrate judge to file a recommendation with respect to Defendant's Motion for Summary Judgment filed on November 15, 1999, and the provision; of 28 U S.C. §636(b)(1)(B) and (C), the magistrate judge files his recommendation as evidenced by his signature hereto:

Before the court is Plaintiff's motion, brief and appendix filed on November 15, 1999. Plaintiff's response, brief and appendix Filed On December 15,, 1999 Defendant's reply filed on January 18, 2000, and Plaintiff's Volume III appendix filed on May 17, 2000

Plaintiff, Azteca Enterprises, Inc., has brought this action alleging that it was the victim of race discrimination in the awarding of a contract for the manufacture of crossties to be used in the construction of Defendant's light-rail transportation system. It is undisputed that Plaintiff was the apparent low bidder after Defendant notified 102 contractors, more than 40 of which were minority-owned businesses. Of

the 29 vendors which responded, 7 were minority-owned. After the submitted bids were opened on September 2, 1998, and Plaintiff's bid was the lowest, Defendant through its contract officer, Ed Hammond, undertook a responsibility review and determination. Shortly thereafter the next lowest bidder filed a protest contesting Plaintiff's lower bid. On September 14, 1998, Defendant through Mr. Mercer informed Plaintiff that Plaintiff had been determined to be "non-responsible" and therefore was ineligible to obtain the cross-ties contract.

The contract was ultimately awarded to Rocla Concrete Tie, Inc., whose bid was the next lowest to that which Plaintiff submitted. Plaintiff thereafter filed an administrative protest following a hearing before an administrative law judge, the ALJ issued an opinion on January 21, 1999, finding that Plaintiff had failed to show that Defendant's determination of "non-responsibility" was made fraudulently or in bad faith and that Plaintiff did not meet the general responsibility requirements of the bid solicitation.

In its petition filed in this action- subsequently removed to federal court Plaintiff alleged violations of 42 U.S.C. §§1981 and 1983, racial discrimination in violation of Title VI of the Civil Rights Action of 1964 (42 U S C. §2000d) and violations of due process rights under the Texas state constitution. Plaintiff sought injunctive relief, actual and punitive damages and recovery of its attorney's fees.

On February 23, 1999, the District Court denied Plaintiffs request for injunctive relief and subsequently on August 4, 1999, granted Defendant's motion to dismiss Plaintiffs claims brought pursuant to 42 U.S C. 1981 and 1983, Plaintiffs state constitutional claims and its claim for punitive damages. Therefore, the only remaining claim is Plaintiff's action for loss profits damages predicated on Defendant's alleged violation of Title VI.

Title VI provides:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance.

It is undisputed that DART has received federal funding to underwrite in part the costs associated with the construction of its light rail transit system. In moving for summary judgment Defendant claims that Azteca Enterprises, Inc, lacks standing to bring this action because it is neither a beneficiary, nor a participant in DART's federally funded program. In the alternative DART further claims that Plaintiff has failed to make a prima facie showing that DART's refusal to award Plaintiff the cross-tie contract was racially discriminatory.[1]

Defendant's attack on Plaintiff's standing to bring this action for lost profits is predicated on its contention that Plaintiff was neither a beneficiary of nor a participant in the federally assisted funding for construction of DART's light rail system. E.g. See Simpson v. Reynolds Metal Co Inc., 629 F 2d 1226, 1235 (7th Cir. 1980)

The summary judgment evidence before the court in Hudson Valley Freedom Theater, Inc. v. Heinbach, supra (See n. 1) is in stark contrast to the undisputed facts in the present action. The plaintiff theatre had been a prior recipient of funds allocated to the state agency (Orange County) from federal funds under the Comprehensive Employment and Training Act, a CETA grant. Approximately six months after the county granted the plaintiff's application for funding to restore a building as a theatre, the county informed the theatre that the project and funding were abolished. In addition, two Title II Public Employment positions which were approved by the county agency were abolished due "to lack of funds", and two previously approved youth programs

were "inordinately delayed." See Hudson Valley Freedom Theater, Inc. v. Heinbach, 513 F.Supp. 250, 251-52 (SD. N.Y. 1981).[2]

As compared to the Hudson Valley plaintiff there is no evidence that Azteca was ever a participant in a federally funded program. Specifically no written contract was ever executed awarding the cross-tie subcontract to Azteca, nor was there any oral commitment made by DART to Plaintiff. To the contrary the summary judgment evidence is clear that although Plaintiff submitted the initial lowest bid, it was rejected by DART's contract officer.[3]

Plaintiff's effort to establish a genuine issue of fact with reference to its status as a beneficiary of the federal funding from DART's light rail system also founders as a matter of law. The beneficiaries of a light rail system such as DART'S arc the patrons (passengers) who use the mass transit facility. Plaintiff has pointed to no evidence which would tend to establish any intention that the cross-lies subcontract be awarded to a minority-owned business. Indeed where a light rail system is intended for the exclusive purpose of transporting human passengers at relatively high rates of speed, the dominant priority for construction of the trackage, the passenger vehicles, and the component parts of each is the safety and integrity of each element of the light rail system

Although the facts related in Miller v. Phelan, 845 F.Supp. 1201 (N D Ill. 1993), are largely dissimilar from those alleged by Plaintiff in this action, that court's determination that the plaintiff was not a beneficiary under federal funds awarded to an area transit authority and "[i]n truth, the most likely beneficiaries are the riders (Id at 1 207)", is persuasive and dispositive of Azteca's claim that it was an intended beneficiary.

In Jackson v. Katy Independent School, 951 F.Supp 1293, 1298(50. Tex. 1996), the court found that parents of a student in Defendant's school system did not have standing to bring

an action in their own behalf under Title VI where the intended beneficiaries of the federal funds provided to the school district were the students, not their parents. Accord See Rowinsky v. Bryan I S.D. 80 F3d 1006, at 1009 n.4 (5th Cir.) cert. denied 519 U.S. 861, 117 S.Ct 165 (1996).

DART also seeks summary judgment on additional grounds in the event that it is either found or assumed that Plaintiff has standing under Title VI to sue for recovery of damages consisting of lost profits. However, because it is clear that Azteca Enterprises cannot establish the necessary prerequisite of standing, the magistrate judge is of the opinion that these additional bases for summary judgment need not be addressed.

RECOMMENDATION

For the foregoing reasons it is recommended that the District Court find that Azteca Enterprises, Inc. has no standing to bring a claim for damages under title VI (42 U.S.C. §2000d), and that its order be entered granting Dallas Area Rapid Transit's motion for summary judgment.

A copy of this recommendation shall be transmitted to counsel for the parties.

UNITED STATES MAGISTRATE JUDGE

NOTICE

In the event that you wish to object to this recommendation, you are hereby notified that you must file your written objections within ten days after being served with a copy of this recommendation. Pursuant to Douglass v. United Servs. Auto Ass'n, 79 F.3d 1415 (5th Cir. 1996)(en banc), a party's failure to file written objections to these proposed findings of fact and conclusions of law within such ten-day period may bar a de novo determination by the district judge of any finding or fact or conclusion of law and shall bar such party, except upon grounds of plain error, from attacking on appeal

the unobjected to proposed findings of fact and conclusions of law accepted by the district court.

Footnotes

[1] The magistrate judge is of the opinion that there is a significant issue which affects this court's jurisdiction to address the remaining claim brought by Plaintiff: which neither side has addressed, to wit: Whether Plaintiff is an aggrieved party entitled to the protections afforded under Title VI.

Plaintiff is a corporation. It is well settled that a corporation is a "person" within the purview of statutory and case law. A corporate structure affords certain protections and limitations on a business entity's ability to act. For instance, absent a sufficient showing warranting "piercing of the corporate veil", the owners of a corporation are protected from personal liability for the debts and obligations of the corporation On the other hand, unlike a natural person or a suit proprietorship, a corporation can proceed in litigation only through an attorney

A corporation is an artificial person, created by law As distinguished from a natural person, a corporation has neither the attributes of race nor of gender. E. g See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U S. 252, 263, 97 S. Ct 555, 562 (1977), "a corporation has no racial identity and cannot he the direct target of alleged discrimination."

Although there are reported cases in which a corporation has been permitted to bring an action based on alleged discriminatory conduct, E.g. Enplaner, Inc., v. Marsh, Secretary of the Army, 11 F 3d 1284 (5th Cir.) cert. denied 513 U S. 926, US S Ct. 312 (1994); Cone Corp. v. Florida Department of Transportation, 21 F.2d 1190 and 1205 at n. 49 (11th Cir), cert denied 500 U.S., 942, 111 S.Ct. 2238 (1991), the magistrate judge has found only one reported circuit court opinion, holding that a corporation, as the sole plaintiff had

standing to bring an action in its own behalf under Title VI. See Hudson Valley Freedom Theater, Inc. v Heinbach, 671 F 2d 702 (2nd Cir.) cert. denied, 459 U S 857, 103 S Ct. 127(1982).

Perhaps the District Court may wish to invite the parties to address this issue further

[2] Although the District Court's disposition of the case was reversed on appeal, the appellate court did not disturb the summary judgment facts found by the lower court

[3] The only evidence which Plaintiff has presented in an effort to show that it was a participant in a federally- funded program is its answer to Defendant's interrogatories, contending that it was a "participant" because Azteca was fully certified under the Small Business Administration and the North Central Texas Regional Certification Agency (Defendant's Appendix at 363-364). Further, at Plaintiff's president's deposition he advised that Defendant had no more evidence on this issue (Id at 156-59. Assuming that these qualifications entitled Azteca to bid on the cross-tie subcontract this fact no more establishes that it was a "participant" in a federally funded contract than were the 28 other minority-owned and non minority owned businesses, whose bids on the contract were unsuccessful. See also United States v Harris Methodist Fort Worth, 970 F.2d 94, 97-98 and (5th Cir. 1992), wherein the court distinguished the participant status of a physician with staff privileges at a hospital receiving federal assistance from most other vendors or suppliers whose activities only indirectly relate to providing patient care. Of course, in the present case, for the reasons noted above, Azteca was never either a vendor nor supplier with respect to the light rail project.

CIVIL ACTION NO. 3:99-CV-0281-P

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

AZTECA ENTERPRISES, INC,
Plaintiff,

v.

DALLAS AREA RAPID TRANSIT,
Defendant.

August 4, 1999, Filed

August 4, 1999, Entered on Docket

ORDER

On July 29, 1999, the Court heard oral argument from the parties on Defendant's Motion to Dismiss. Based on the record made in open court, the Court hereby GRANTS IN PART and DENIES IN PART Defendant's motion. Plaintiff's 42 U.S.C. §§ 1983 and 1981 causes of action; Plaintiff's claims under the Texas Constitution; and Plaintiff's action for punitive damages are hereby DISMISSED WITH PREJUDICE. Defendant's motion is DENIED, however, as to Plaintiff's Title VI claims.

SO ORDERED this 3rd day of August, 1999.

United States District Judge

CIVIL ACTION NO. 3:99-CV-0281-P

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

AZTECA ENTERPRISES, INC,
Plaintiff,

v.

DALLAS AREA RAPID TRANSIT,
Defendant.

February 23, 1999, Decided

February 23, 1999, Filed,
Entered on Docket

COUNSEL:
For AZTECA ENTERPRIZES INC, plaintiff: Frank P Hernandez, Attorney at Law, Law Office of Frank P Hernandez, Sol Villasana, Attorney at Law, Law Office of Sol Villasana, Dallas, TX USA.

For DALLAS AREA RAPID TRANSIT, defendant: Paul D'Aloisio, Patricia M Reed, Roland Castaneda, Attorneys at Law, Dallas Area Rapid Transit, Dallas, TX USA.

For ROCLA CONCRETE TIE INC, movant: William G Whitehill, Elaine A Murphy, Attorneys at Law, Gardere & Wynne, Marshall J Doke, Jr, Attorney at Law, McKenna & Cuneo, Dallas, TX USA.

JUDGES:
JORGE A. SOLIS, UNITED STATES DISTRICT JUDGE.

OPINION BY:
JORGE A. SOLIS

OPINION:

MEMORANDUM OPINION AND ORDER

Presently before the Court is Plaintiff's Motion for a Temporary Restraining Order and Permanent Injunction,[1] filed on February 9, 1999. Defendant filed a Response on February 16, 1999 and Plaintiff filed a Reply on February 17, 1999. For the reasons set forth below, Plaintiff's motion is DENIED.

BACKGROUND

This is a discrimination case. Azteca Enterprises, Inc. ("Plaintiff" or "Azteca") alleges that Dallas Area Rapid Transportation ("Defendant" or "DART") committed acts of discrimination in violation of (1) *42 U.S.C. § 1983;* (2) *42 U.S.C. § 1981;* (3)Title VI of the Civil Rights Act of 1964 *(42 U.S.C. § 2000* et seq.) and the regulations contained in 49 C.F.R. § 21, 49 C.F.R. § 23, Pub. L. No. 95-507 and Pub L. No. 100-656; and, (4) Plaintiff's due process rights under the Texas Constitution when it denied awarding a contract ("Contract") to Plaintiff for the production of concrete crossties. Plaintiff, a minority owned corporation that is recognized as a Historically Underutilized Business ("HUB") by the State of Texas and the City of Dallas, Texas, is a concrete and steel contractor who submitted the lowest bid on September 3, 1998 to Defendant for the construction of crossties that are critical to Defendant's construction of a twenty-three (23) mile extension of its Light Rail Transit ("LRT") System. Pl.'s Compl. at 2; Def's Resp. at 1. The Contract is part of Defendant's $990,000,000.00 public works project funded by federal dollars to expand or "buildout" Dallas' existing LRT system to Plano and Garland. The Contract is to produce 88,300 concrete crossties that will support the track for the entire "buildout."

The procedural history of this case is as follows. Despite Plaintiff submitting the lowest bid, on September 14, 1998, Defendant's Contracting Officer determined that because Plaintiff was not a "responsible" low bidder, Defendant could not award the contract to Plaintiff.[2] Plaintiff sought

reconsideration of the Contracting Officer's determination and submitted additional information on its status as a responsible bidder. However, despite Plaintiff's effort, Defendant's Vice President for Procurement and Material Management issued his final decision on October 14, 1998 denying Plaintiff's protest. During late October 1998, Plaintiff then made a request for reconsideration to Defendant's Board of Directors. In response to this request, the Board decided to defer determining whether to award the Contract to the second lowest bidder so that "proper and fair consideration can be given to Azteca's appeal." Def.'s Resp. Ex. 4 at 14. During mid November 1998, pursuant to DART's Protest Appeal Procedures, Defendant's Contracting Officer forwarded the protest appeal and a motion to dismiss to an Administrative Judge for determination. On January 21, 1999, the Administrative Judge granted Defendant's motion to dismiss finding that Plaintiff had failed to show that Defendant made its determination of nonresponsibility fraudulently or in bad faith. *See id.* at 27. Plaintiff immediately filed a motion to reconsider, which is presently pending.

On February 9, 1999, Plaintiff filed its Complaint and Motion for a Temporary Restraining Order and Permanent Injunction in state court in Dallas, Texas. On that same day, Defendant removed the case to this Court. In the present motion, Plaintiff requests that the Court issue injunctive relief to prevent DART from awarding the Contract to the second lowest bidder pending the outcome of its claims for discrimination.

DISCUSSION

A Court may enter injunctive relief only if the moving party establishes each of the following four factors: (1) a substantial threat that the denial of the injunction will result in irreparable harm to the plaintiff; (2) the threatened injury to the plaintiff outweighs any damage that the injunction may cause to the opposing party; (3) a substantial likelihood that the plaintiff will succeed on the merits; and (4) the injunction will not deserve the public interest. ***Allied Marketing Group, Inc. v CDL Marketing, Inc. 878 F.2d 806 (5th Cir. 1989).***

These factors must be balanced to determine whether they collectively favor the issuance of an injunction. *DSC Communications Corp. v. DGI Tech., Inc. 898 F. Supp. 1183, 1187 (N.D. Tex. 1995), aff'd 81 F.3d 597 (5th Cir. 1996).* A preliminary injunction is an extraordinary remedy, available only when the plaintiff has clearly carried his burden of proof as to all four elements. *Kern River Gas Transmission v. Coastal Corp., 899 F.2d 1458, 1462 (5th Cir. 1990).* All four elements are mixed questions of law and fact. *Id.* If a party cannot prove all four elements a Court must deny the injunctive relief "since the decision to grant a preliminary injunction is to be treated as the exception rather then the rule." *Danden Petroleum, Inc. v. Northern Natural Gas Co., 615 F. Supp. 1093, 1097 (N.D. Tex. 1985); see LaFarge Corp. v. Cement Transp. Corp., 1996 U.S. Dist. LEXIS 247, CIV.A.NO. 95-4255, 1996 WL 7042,* *1 (E.D. La. Jan. 9, 1996). A district court's determination on whether to issue a preliminary injunction will be reversed only upon a showing of an abuse of discretion. *Kern River Gas Transmission, 899 F.2d at 1462*

The first prong of the preliminary injunction test asks whether Azteca suffers irreparable harm as a result of DART's awarding of the Contract to the second lowest bidder. In determining irreparable harm, it is not so much the magnitude of the harm claimed by Plaintiff but the "irreparability that counts for purposes of a preliminary injunction." *Danden Petroleum, 615 F. Supp. at 1098.* In discussing the irreparable injury factor, the Fifth Circuit has found that an injury is irreparable if it cannot be undone through monetary relief. *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 472-73 (5th Cir. 1985)*

The key word is irreparable, and an injury is 'irreparable' only if it cannot be undone through monetary remedies. Thus the possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weight[s] heavily against a claim of irreparable harm.

Id. Thus the Court's equitable powers can be properly invoked only upon a showing that a money damages recovery will be insufficient to remedy the injury that the movant is presently suffering. When the movant fails to prove that, absent the injunction, irreparable injury will result, the preliminary injunction may not be granted. *See Danden, 615 F. Supp. at 1098; LaFarge Corp., 1996 WL 7042,* at *1 ("A finding of no irreparable injury is, itself sufficient to deny a preliminary injunction.")

Plaintiff's claim of injury from Defendant's denial of the crossties contract is a claim of monetary injury, which can be calculated and compensated in full by a judgment for money damages. Furthermore, the Court disagrees with Plaintiff's argument that the injury to reputation and goodwill, which might possibly occur, is enough to satisfy the irreparable injury prong. While this may sometimes be true, there is not a per se rule that such harm is always irreparable by a remedy at law. *LaFarge Corp., 1996 WL 7042,* at *1.

As to the second factor, Plaintiff has also failed to demonstrate that the threatened injury to it outweighs any damage the injunction might cause to DART. As stated above, Plaintiff's primary injury claimed in the absence of an injunction is monetary. However, if DART is forced to wait any longer in awarding the crossties contract, the whole $ 990,000,000.00 project will be delayed. The evidence shows that at the latest, the construction of crossties must begin by March 1, 1999 in order to maintain the current schedule. Def.'s Resp., Ex. 3, Thomas Aff. P 5. In addition, as Defendant points out, this one contract is but a small portion of the work that needs to be done, but has the potential to disrupt all of DART's deadlines.

Because Plaintiff has failed to meet the first two factors in granting a preliminary injunction, the Court need not consider the other two factors. *See Danden, 615 F. Supp. at 1098.* Plaintiff has not met its burden in establishing the need for a preliminary injunction.

CONCLUSION

Having considered the law and facts surrounding the above-captioned matter, the Court, in the exercise of its discretion, finds that Plaintiff's motion is DENIED.

So ordered.

Signed this 23rd day of February, 1999.

JORGE A. SOLIS

UNITED STATES DISTRICT JUDGE

Footnotes

[1] Plaintiff's request for a temporary restraining order was rendered MOOT when Defendant agreed to move the date of the Board of Directors meeting to February 23, 1999. In addition, although Plaintiff requests a permanent injunction, the Court understands Plaintiff's motion to be requesting a preliminary injunction and will therefore analyze Plaintiff's request under the necessary elements for a preliminary injunction.

[2] According to Defendant, when reviewing Plaintiff's bid, questions arose as to Plaintiff's past performance and experience record, in addition to the equipment it proposed to use in producing the crossties. Specifically, Defendant found that Plaintiff had failed to show that it has been an active and qualified participant of the PCI Plant Certification Program that Defendant's regulations follow, and that it has been continuously engaged in the manufacture of concrete crossties. Def.'s Resp. at 6-8.

Supreme Court, U.S.
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No. 01-1642

In the

Supreme Court of the United States

AZTECA ENTERPRISES, INC.,

Petitioner,

v.

DALLAS AREA RAPID TRANSIT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DALLAS AREA RAPID TRANSIT

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QUESTIONS PRESENTED

1. Whether this Court should deny Plaintiff-Petitioner's writ of certiorari because there is no conflict between the Fifth Circuit decision holding that Plaintiff-Petitioner lacked standing to bring suit under Title VI (42 U.S.C. §2000d and the Ninth Circuit's decision in *Fobbs v. Holy Cross Health System Corporation*, 29 F.3rd 1429 (9th Cir. 1994) *cert denied*, 513 U.S. 1127, 115 S.Ct. 936, 130 L.Ed.2d 881 (1995)?

2. Whether the district court properly dismissed and the circuit court properly affirmed the dismissal of Plaintiff-Petitioner's Title VI (42 U.S.C. §2000d) claim because it lacked standing?

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STATEMENT OF THE CASE

On February 9, 1999, Petitioner Azteca Enterprises Inc. ("Azteca") filed its Original Petition and Application for a Temporary Injunction against Respondent Dallas Area Rapid Transit ("DART") in the 44th District Court in Dallas, Dallas County, Texas, disputing the award of a concrete crosstie contract to another bidder. DART removed the case to the United States District Court for the Northern District of Texas on the same day. On February 23, 1999, the district court filed its Memorandum Opinion and Order denying Azteca's attempt to enjoin the DART Board of Directors from awarding the concrete crosstie contract to another bidder. (App. 18a-23a and App. 11a).

On August 4, 1999, the district court granted DART's Motion to Dismiss, filed pursuant to Fed.R.Civ.P. 12(b)(6), dismissing Azteca's claims under 42 U.S.C. §§ 1983 and 1981, the Texas Constitution, and for punitive damages. (App. 17a and App. 11a). The court, however, denied DART's Motion to Dismiss Azteca's Title VI claim. (App. 17a and App. 11a).

On November 15, 1999, DART filed its Motion for Summary Judgment, pursuant to Fed.R.Civ.P. 56(b), challenging both Azteca's standing to bring suit under Title VI and the merits of the claim. On September 15, 2000, Magistrate Judge Sanderson submitted his Report and Recommendation recommending that the district court grant DART's Motion for Summary Judgment on Azteca's Title VI claim on the ground that Azteca had no standing to bring a claim for damages under Title VI. (App. 10a-16a). On January 16, 2001, the district court adopted the findings, conclusions and recommendations of the Magistrate Judge and granted DART's Motion for Summary Judgment. In so doing, the Court noted that Azteca had improperly tendered evidence in its objections to the Magistrate's findings and recommendations, but that the Court had reviewed such evidence in making its findings, and determined that the evidence was hearsay and conclusory. (App. 7a-9a).

Azteca filed its Notice of Appeal on February 9, 2001. Without hearing oral argument, the Court of Appeals for the Fifth Circuit issued an unpublished Summary Calendar opinion reversing and remanding the district court's

judgment granting DART's 12(b)(6) Motion to Dismiss Azteca's claims under 42 U.S.C. §§ 1983 and 1981, the Texas Constitution, and for punitive damages, and affirming the district court's judgment on DART's Motion for Summary Judgment on Azteca's Title VI claim. Azteca did not file a Petition for Rehearing.

REASONS FOR DENYING THE WRIT

This Court should not review the decision of the Fifth Circuit Court of Appeals in the present case because it correctly affirmed the district court's dismissal of Azteca's Title VI (42 U.S.C. §2000d) claim based upon lack of standing. The Fifth Circuit properly determined that Azteca has no standing to sue under Title VI because it failed to prove that it was an intended beneficiary of, an applicant for, or a participant in DART's federally funded transportation program. Azteca's disagreement with both the Fifth Circuit's and the district court's findings is insufficient to warrant review by this Court.

I.
THE FIFTH CIRCUIT DECISION BELOW IS NOT IN CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN *FOBBS VS. HOLY CROSS HEALTH SYSTEM CORPORATION* OR ANY OTHER CIRCUIT

The Fifth Circuit determined that Azteca lacked standing to sue under Title VI because Azteca failed to prove that it was an intended beneficiary of, an applicant for, or a participant in DART's federally funded transportation program.[1] Azteca claims that this decision is in conflict with the Ninth Circuit's decision in *Fobbs v. Holy Cross Health Service Corporation*, 29 F.3d 1429 (9th Cir. 1994) cert. denied, 513 U.S. 1127, 115 S.Ct. 936, 130 L.Ed.2d 881 (1995), which held there is no requirement that the plaintiff plead that he was an intended beneficiary of the federally-funded program in which defendants are alleged to have participated. *See Fobbs*, 29 F.3d at 1447. This case is not concerned with the sufficiency of Azteca's pleadings. Contrary to Azteca's

contentions, there is no confusion among circuits[2] regarding what is required to sustain a cause of action under Title VI.

Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d) states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Fifth Circuit relied, in part[3], on the seminal decision in *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980) in affirming the judgment of the lower court that Azteca had no standing to sue under Title VI. (App. 3a). Credited largely with developing the "Intended Beneficiary Doctrine", the Seventh Circuit identified the true essence of Title VI's standing requirement, which is a "logical nexus" between the federally funded program or activity and the person who is entitled to sue. *See Simpson*, 629 F.2d at 1235.

The "logical nexus" identified by the *Simpson* Court requires that a plaintiff "**be** an intended beneficiary or, an applicant for, or a participant in a federally funded program." *Id.* (emphasis added) This well-established requirement[4] is vital to a plaintiff's ability to assert and sustain a Title VI cause of action. Azteca cites to *Fobbs* for its authority that there is a split between the Fifth and Ninth Circuits regarding pleading requirements under Title VI. Although Azteca correctly notes that Title VI grants some persons a private cause of action, its conclusion that it has standing to bring an action under Title VI is incorrect.

For Title VI purposes, the *Fobbs* opinion, at most, stands for the proposition that failure to plead intended beneficiary status in a federally funded program is not fatal to surviving a Motion to Dismiss for failure to state a claim under Title VI. *Fobbs*, 29 F.3d at 1447. Irrespective of the alleged disunity in the courts regarding pleading requirements under Title VI, all of the circuits, including the *Fobbs* Court, require that one prove that it is the intended beneficiary to recover under Title VI. *Cf. Fobbs*, 29 F.3d at

1447 (Although the plaintiff must prove intended beneficiary status at trial, it need not be pled in the complaint); *See also Wrenn v. State of Kansas*, 561 F.Supp. 1216, 12121 (D.Kan.1983)(court held that there was no requirement that the plaintiff plead that he was an intended beneficiary, but acknowledged that "[p]laintiff eventually must prove this fact."); *Scelsa v. City University of New York*, 806 F.Supp. 1126, 1140 (S.D.N.Y.1992) (In order to establish standing to sue under Title VI plaintiff must be the intended beneficiary of a federal spending program; while such fact need not be pleaded, it must eventually be proven in order for plaintiff to recover); *Grimes v. Superior Home Health Care of Middle Tennessee, Inc.*, 929 F.Supp. 1088, 1092 (M.D.Tenn.1996). Thus, the legal question here involves proof of ability to sustain a cause of action under Title VI, not sufficiency of the pleadings.

Azteca's reliance on the *Fobbs* case to demonstrate disunity between the Ninth and Fifth Circuits fails for other reasons as well. First, the *Fobbs* case is questionable legal authority as compared to the treatment of this issue across circuits.[5] More importantly, unlike this case, the *Fobbs* Court reviewed a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).[6] *Cf. Fobbs*, 29 F.3rd at 1447 *with Jackson*, 951 F.Supp. at 1298 (a plaintiff must be an intended beneficiary of, applicant for, or participant in a federally funded program to have standing to assert a claim under Title VI). In response to DART's Motion for Summary Judgment, Azteca failed to produce sufficient evidence that it is an intended beneficiary of, an applicant for, or a participant in DART's program. Azteca's misguided reliance on the *Fobbs* opinion to demonstrate disunity among the circuits, or that the lower courts were in error in the application of the law, misses the point.

Assuming arguendo and without concession that there is a split among the circuits on the question of Title VI's standing requirement, this is not the case to decide what the law is or should be. First, this case has been remanded to the district court for further proceedings on Azteca's claims under 42 U.S.C. §§ 1983 and 1981, the Texas Constitution, and for punitive damages. Even if the Court believed there was a

split in the circuits, it should defer consideration of the issue for development of a more complete record. Second, disuniformity among the circuits may be tolerable. Disagreement in the lower courts facilitates the independent evaluation of factual and legal issues by different courts.

II.
THE DISTRICT COURT PROPERLY DISMISSED, AND THE FIFTH CIRCUIT PROPERLY AFFIRMED THE DISMISSAL OF, THE TITLE VI CLAIM

The lower courts correctly considered DART's Motion for Summary Judgment, including summary judgment evidence, on Azteca's Title VI claim and appropriately applied established legal precedent to find that Azteca had no standing to bring a claim for damages under Title VI. Petitions for a writ of certiorari are rarely granted when the asserted error consists of erroneous factual findings. *See* Sup.Ct.R. 10. As the non-movant in response to DART's Motion for Summary Judgment, Azteca failed to carry its burden to establish a material issue of fact that it was ever an applicant, participant, or beneficiary in any federally funded program carried out by DART.

Azteca inartfully contends that it became an applicant and a participant under Title VI when it was "invited to bid on DART's [contract] Solicitation" or, alternatively, during its past interactions with DART prior to the Solicitation. Neither of these contentions is sufficient to create a "logical nexus" between Azteca's "participation" and DART's "federally funded program". *See Simpson*, 629 F.2d at 1235; *See also United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 98 (5th Cir. 1992). Azteca's argument that the exclusion of evidence[7] by the lower court (so-called "plain error") warrants certiorari cannot be sustained where the district court's order expressly states that it considered the evidence.

Azteca's argument that "all DBE's are meant to be beneficiaries" under Title VI protection is also insufficient justification to grant the petition. The *Simpson* Court noted that "[t]he legislative history of Title VI also lends strong support to the conclusion that **Congress did not intend to**

extend protection under Title VI to any person other than an intended beneficiary of federal financial assistance." *Simpson*, 629 F.2d at 1235 (citing 110 Cong. Rec. 1518-21) (emphasis added). Thus, for the purposes of Title VI, DART's bus, train, paratransit, and HOV passengers are the intended beneficiaries of DART's federal funds. *See Miller v. Phelan*, 845 F.Supp. 1201, 1207 (N.D. Ill. 1993) ("the most likely beneficiaries of the [Cook County Regional Transportation Authority] are the riders"). *See also Jackson*, 951 F.Supp. at 1298 (S.D. Tex. 1996) (the intended beneficiaries of the federal funds provided to the school district were the students, not their parents, under Title VI); *Harris Methodist Fort Worth*, 970 F.2d at 98 (not every vendor of supplies or services to [an entity] that receives federal funds is a 'participant' in [that entity's] operations protected by §601). This Court should not grant the petition in this case because the Fifth Circuit decision, which forms the basis of this appeal, is a correct application of existing law. Therefore, this Court should not review the lower courts' decisions in this case.

This Court should view Azteca's claim that "all DBE's are meant to be beneficiaries" of Title VI's protection with caution. For the purposes of standing under Title VI, a company's DBE status should not, on its face, be the deciding factor for entitlement to sue under the Act. Courts across all circuits have tended to interpret the meaning of "intended beneficiary" narrowly, and they are correct in doing so. An expansive view of intended beneficiary status is troubling and could lead to discriminatory results[8]. Azteca's strained logic would confer beneficiary status on anyone who attempts to contract with a recipient of federal funds. This Court should not disturb the consistent approach currently employed by the circuits.

CONCLUSION

For these reasons, Respondent respectfully requests the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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[1] The Fifth Circuit's review of the district court's decision was based upon the well settled principle that the court must "review the [summary judgment] evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party" as well as applicable case law. *See* Fed.R.Civ.P. 56(c). Thus, the issue decided by the Fifth Circuit concerned Azteca's ability to assert and sustain a cause of action under Title VI. Azteca has improperly framed its Petition for a Writ of Certiorari on the issue of what is required to adequately plead a cause of action under Title VI. Better stated, Azteca's Petition, and its reliance on the *Fobbs* opinion, is focused on the issue of what is required to survive a Motion to Dismiss for failure to plead a cause of action under Title VI. In its Petition, Azteca wholly fails to identify, much less raise, an appropriate issue for

consideration by this Court. As a result, DART objects to Azteca's Specific Legal Reasons For Granting The Writ on the grounds that the issue of pleadings requirements is not an issue in this case, that the *Fobbs* opinion does not control the basis for the Fifth Circuit's decision in this case, and that there is no disunity among the circuit courts concerning the issue of what is required to assert and sustain a cause of action under Title VI.

[2] Azteca has failed to provide sufficient information concerning the manner in which all of the other circuit courts have treated the *Fobbs* decision to justify its claim of disunity among circuit courts for the purposes of sustaining a Petition for Writ of Certiorari. DART reurges its objection to Azteca's Specific Legal Reasons For Granting The Writ on the grounds that Azteca has wholly failed to identify and raise an appropriate issue for consideration by this Court, that the issue of pleadings requirements is not an issue in this case, that the *Fobbs* opinion does not control the basis for the Fifth Circuit's decision in this case, and that there is no disunity among the circuit courts on the dispositive issue at hand.

[3] In its Summary Calendar opinion, the Fifth Circuit cites to *Jackson v. Katy Indep. School Dist.*, 951 F.Supp. 1293, 1298 (S.D. Tex. 1996) for the principle that a plaintiff must be an "intended beneficiary of, an applicant for, or a participant in a federally funded program." The *Jackson* case, a Texas federal district court case, cites and follows the *Simpson* case, a Seventh Circuit case, for the same principle.

[4] The standing requirement handed down by the *Simpson* Court is widely cited and applied across circuits in cases involving both dismissal for failure to plead facts necessary to maintain juridictional standing and failure to prove the standing requirement under Title VI. *See Griggs v. Lexington Police Department*, 672 F.Supp. 36, 39 (D.Mass. 1987); *United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 98 (5th Cir. 1992); *Miller v. Phelan*, 845 F.Supp. 1201, 1207 (N.D. Ill. 1993); *Jackson v. Katy Indep. School Dist.*, 951 F.Supp. 1293, 1298 (S.D. Tex. 1996); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 485 F.Supp. 255, 261 (N.D. Tex. 1980); *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129, 132-33 (5th Cir. 1981); *Doe on behalf of Doe v. St. Joseph's Hosp. of Fort Wayne*, 788 F.2d 411. 418-19 (7th Cir. 1986); *Scelsa v. City Univ. of New York*, 806 F.Supp. 1126, 1140 (S.D.N.Y. 1992); *Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672, 674 (8th Cir. 1980).

[5] The *Fobbs* case has been overruled by *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1133 (9th Cir. (Cal) 2001) on the issue of the application of the equitable tolling requirement.

[6] Although a small minority of courts have held that a Title VI claim should not be dismissed for failure to plead intended beneficiary status, these cases have no bearing on whether Azteca actually is an intended beneficiary for the purpose of asserting or sustaining a Title VI claim.

[7] Azteca improperly tendered evidence in its objections to the Report and Recommendations of the Magistrate Judge. Nevertheless, the district court, upon review of the evidence, determined that the so-called evidence did not cure the standing deficiency because it did not establish anything more than Azteca's prior unsupported conclusion that it was a "participant." (App. 7a).

[8] In response to concern voiced during debates on the Civil Rights Act of 1964 that Title VI would allow government intervention into every aspect of the operations of recipients of federal financial assistance, Representative Celler stated:

> "This title simply provides that, where Federal money is used to support any program or activity . . . ***the program must be used for the benefit of both races, without discrimination***. The bill would require that each federal agency which extends financial assistance of the type covered by Title VI must establish nondiscriminatory standards of general application.

See Simpson, 629 F.2d at 1243 (fn 17, citing 110 Cong. Rec. 1518-21) (emphasis added).